

**FEDERAL MILITARY LEAVE
SHRM & OGLETREE-DEAKINS & DOL WEB/CONFERENCE CALL
OVERVIEW OF USERRA
October 4, 2001**

USERRA (UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT) pre-empts other laws. This act emerged from the country's Gulf War experience.

REQUIREMENTS FOR USERRA COVERAGE

1. Must be an employee employed by an employer
2. Advance notice must be given
3. Military Service is not greater than 5 years (certain military duties do not trigger the 5 year limit)
4. Honorable service
5. Timely return to service

ALL EMPLOYERS ARE REQUIRED TO COMPLY: Federal, state, local, private, large, small. No minimum service requirement, no Full-time requirement. Applicants are covered, i.e., can't discriminate against an applicant who is a member of the Guard or Reserves in hiring practices.

DEPARTING EMPLOYEES NEED TO PROVIDE

1. Advance notice, written or verbal. Or notice can be provided by an appropriate military officer. Notice could be precluded by military necessity.
2. Benefits continuation. Follow COBRA. Health coverage up to 18 months. Employee is not required to pay more than 102%. Employee should have no waiting period on reinstatement of coverage upon return. DOL site is www.dol.gov/dolpwpba for pension guidance, filing requirements.
3. Accumulated paid leave. Some employers provide the pay differential between civilian and military pay, though not required to do so. The employer cannot require the use of accumulated leave, but must allow it.

BENEFITS THAT ACCRUE OVER THE PASSAGE OF TIME (pay raises, rate of vacation accrual, pension and vesting benefits) continue while the employee is on leave. Payments to pension plans come due when the employee is reemployed. Wages are not required to be paid for military service, though many employers are providing differential pay or full pay.

DOES THE EMPLOYER HAVE TO HOLD THE JOB OPEN? Employer can fill the position, but the employee is entitled to the same position, or a comparable position, even if bumping of the replacement employee is required.

REEMPLOYMENT: Employee cannot have a disqualifying discharge.

Timely notice to return is required after either short service or lengthy service. If service was for

1. 30 days or less: Employee must report at 1st regularly scheduled work day after reasonable travel and one rest day.
2. 30 –180 days: Employee has 14 days to report.
3. 180+ days: Employee has 90 days to report to work.

ESCALATOR PRINCIPLE: Like stepping off of an escalator. The employee steps back on at the point it went to during military service.

Employee is entitled to same position they would have received (90 days or less).

Same or another comparable position ((91 days or more)

If the employee would have been laid off, the escalator principle provides that is what they are entitled to upon return.

DISABLED RETURNING VETS: Entitled to broad reasonable accommodation. "Reasonable efforts" and "undue hardship" are defined under USERRA. Hospitalized employees may apply for reemployment within 2 years from the time of their recovery.

SPECIAL PROTECTION – Termination Protection.

If service was for > 180 days, the employee has termination protection, except for cause, for one year.

If service was for 31-180 days, protection is six months.

If service was for less than 30 days, there is no protection.

NON-DISCRIMINATION, NON-RETALIATION IN HIRING, PROMOTION, BENEFITS, COMPENSATION, etc.

State laws may also apply for calls to service by Governor. For example, airport duty could be called by Governor. Ogletree-Deakins has list of state laws. The National Guard also has information.

EMPLOYEES HAVE PRIVATE RIGHT OF ACTION IN FEDERAL COURT, with the assistance of U.S. attorneys. Back pay and double damages are possible for willful violations.

THE VETERANS' EMPLOYMENT AND TRAINING SERVICE (VETS) brief all Guard people when they go to military service and when they return.

QUESTIONS:

What % of employers are doing more than required. 37%.

If you offer additional benefits to some employees do you need to offer to all? Not under USERRA, but other laws may apply.

Can you differ between union and non-union employees and benefits? No agreement can limit USERRA rights. Escalator principle also applies.

If employee wants to keep civilian job and reservist, can employee be forced to give up job? No.

What happens if in middle of RIF? Escalator principle applies. What would have happened had the employee not been called to duty.

For employers providing a pay subsidy, how should managers be compensated on a sales incentive program? Not covered by USERRA. May want to look at the historical track record.

Are stock options also accrued? Would have to determine on a case by case basis. Too many variables.

Responsibility of employee if service is extended? The employee should contact the employer, or a responsible military officer could do so.

Are employers required to continue life and disability benefits during leave? To the extent they provide these benefits for non-military leaves of absence. These are not seniority based benefits.

Banking question about suspending debt while on duty. This has to do with customers of banks. Seek legal advice from military lawyers.

10-4-90 memorandum on Supplemental pay. This stumped the experts. They did not elaborate on the memo.

DOL and VETS and ESGR are there to insure that reservists have their jobs upon return. Supporting reservists is what employers can do to support the war effort.